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No. 85-524

In The
Supreme Court of the United States
October Term, 1985

ROBERT TUDOR,

Petitioner,

v.

JEFFREY LEE GLAESMAN and
ESTHER MARIE GLAESMAN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner, an enrolled member of the Chickasaw Tribe, moved for custody of his daughter shortly after she was born. Petitioner's motion was denied by a Kansas district court which went on to terminate his parental rights and allow the adoption of his daughter by respondents. The sole basis for the district court's action was a Kansas statute that dispenses with the necessity for an illegitimate father's consent to the adoption of his child if he failed to provide support for the mother in the six months before the child's birth. K.S.A. 59-2105(c)(4).

Petitioner raised federal questions regarding the constitutionality of the statute and asserted the applicability of the Indian Child Welfare Act in the Kansas Court of Appeals.[1] The Kansas Court of Appeals summarily affirmed the trial court's decision. Appendix to the Petition for Writ of Certiorari at 13a. Petitioner's constitutional claims (but not the Indian Child Welfare Act claim) were reiterated to the Kansas Supreme Court but that Court declined to review the case. *Id.* at 14a.

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ARGUMENT

Despite the fact that petitioner's federal claims were clearly raised in the Kansas appellate courts, respondents argue that this Court cannot now consider them because they were not properly raised. Respondents also argue

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[1]It is arguable that the constitutional claims were made in the Kansas trial court. Petitioner, who has been represented by different counsel at each stage of the proceedings in this case, thought that a discussion of this Court's decision in Caban v. Mohammed, 441 U.S. 380 (1979) and a reference to equal protection in his post-trial memorandum meant that the constitutional claims had been made. In any event, as shown in this brief the fact that those claims may not have been made in the trial court does not preclude review by this Court.

that the federal claims are without merit. For the reasons set out below, petitioner's federal claims are properly before this Court and require that the action taken below be reversed.

I. THIS COURT HAS JURISDICTION TO REVIEW THE LOWER COURT DECISIONS

Petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1257(3). As required by that statute, petitioner has drawn in question the constitutional validity of a state statute and has specially set up federal rights. A determination by the Kansas Courts of petitioner's federal claims was necessary because they bore directly on the legitimacy of the adoption that was granted and affirmed by those courts. Despite the necessity of determining the federal claims, the state Court of Appeals did not explicitly address them and the Kansas Supreme Court refused to review that decision. Whatever the reason for the neglect of the state courts, however, their failure cannot serve to deprive this Court of jurisdiction.

A. Kansas Appellate Courts Review Claims That Were Not Raised in the Trial Court

Although a Kansas court of review will generally consider only those issues asserted in the trial court, there are exceptions to that rule that appear to be regularly utilized and that are directly applicable here.

The relevant exceptions have been stated and applied many times by the Kansas courts. In *Vansickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973), the Kansas Supreme Court was faced with a constitutional argument that had neither been raised in nor considered by the district court. The Supreme Court held that that omission was not fatal to its consideration of the contention.

> The constitutionality of a statute should be considered in any action where it is necessary in order to determine the merits of the action or where the issues cannot be intelligently decided without doing so, notwithstanding the failure of the parties to raise the constitutional question, failure to plead the question, or failure to present the question to the trial court.

Id. 212 Kan. at 434, 511 P.2d at 231. *citing State v. Nelson,* 210 Kan. 439, 502 P.2d 841 (1972).

Other types of claims are also reviewable even though not raised in the trial court. Kansas appellate courts will consider newly-asserted issues when they arise from proven or admitted facts and will be finally determinative of the case or when consideration of them is necessary to serve the ends of justice or to prevent the denial of fundamental rights. *State v. Puckett,* 230 Kan. 596, 598-599, 640 P.2d 1198, 1200 (1982)[2]; *Pierce v. Board of County Commissioners,* 200 Kan. 74, 434 P.2d 858 ((1967).[3]

Petitioner's constitutional and Indian Child Welfare Act claims clearly fit within the above exceptions. They involve only issues of law, there are no factual disputes and they assert a denial of fundamental rights. The Kansas Supreme Court has, in fact, addressed previously unasserted claims in a case very much like this one.

In the *Matter of the Adoption of Baby Boy L,* 231 Kan. 199, 643 P.2d 168 (1982), the appellees moved for the adoption of Baby Boy L, the illegitimate son of a non-Indian woman and an enrolled member of the Kiowa Tribe. The trial

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[2]Indeed, Kansas courts can themselves raise and decide issues that were never asserted by the parties. *Id.* 230 Kan. at 599, 640 P.2d at 1200.

[3]*See also* Fields v. Stauffer Publications, Inc., 2 Kan. App. 2d 323, 578 P.2d 1138, *review denied* 225 Kan. 843 (1978); *cf.* Taco Bell v. City of Mission, 234 Kan. 879, 678 P.2d 133 (1984); Wortman v. Sun Oil Co., 236 Kan. 266, 690 P.2d 385 (1984).

court found the father unfit to assume parental duties and granted the adoption. In the state Supreme Court, the father argued, for the first time, that the Kansas statute which permitted the adoption of an illegitimate child with only the consent of the mother, K.S.A. 59-2102(2)[4], was unconstitutional. The court had no problem with addressing the argument. "While this argument was not presented to the trial court and ordinarily would not be considered on appeal, we deem the issue raised under *Caban* [*v. Mohammed*] of such significance that we will address the issue". *Baby Boy L,* 231 Kan. at 21[illegible] 643 P.2d at 180.

Given the willingness of the Kansas appellate courts to consider newly-raised issues in cases like this one, there is no jurisdictional obstacle to this Court's review of petitioner's claims.

> [W]here a State allows questions of this sort [federal questions] to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction. . . A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.

Williams v. Georgia, 349 U.S. 375, 383 (1954); *Barr v. Columbia,* 378 U.S. 146, 149 (1964) ("State procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."); *James v. Kentucky,* — U.S. —, —, 104 S.Ct. 1830, 1835 (1984).

The fact that the Kansas Court of Appeals[5] did not explicitly address petitioner's federal claims does not mat-

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[4]The version of K.S.A. 59-2102(2) at issue in *Baby Boy L* was amended in 1982. Kan.L.1982, ch. 182, § 136.

[5]Review by the Kansas Supreme Court was discretionary. *See* K.S.A. 20-3018(b). Because that Court declined review, it is the Court of Appeals' decision that is before this Court. *Cf.* Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157, 160 (1952) (discussing 28 U.S.C. § 1257(2)).

ter. Those claims were a direct challenge to the action of the District Court. The Court of Appeals' summary affirmance therefore "must have rested either upon a substantive rejection of the federal claims or upon a procedural rule that the state court applies only irregularly". *Hathorn v. Lovorn*, 457 U.S. 255, 264-265 (1982). And, again there is no independent and adequate state ground barring this Court's review of the federal claims. *Id.*[6]

B. Petitioner's Federal Claims Challenge the Subject-Matter Jurisdiction of the Kansas Courts

In Kansas, consent by the natural parents to the adoption of their child is "an essential requisite to jurisdiction on the part of the court to render a valid decree of adoption." *In re Marsolf*, 200 Kan. 128, 131, 434 P.2d 1010, 1014 (1967). In the instant case, the district court granted the adoption of petitioner's child without his consent on the basis of an exception to the consent requirement. K.S.A. 59-2105(c)(4). If, as petitioner argues, the exception is invalid, petitioner's consent was required and without it the Kansas court did not have subject-matter jurisdiction to enter an adoption decree. *Marsolf*, 200 Kan. at 131, 434 P.2d at 1014. Further, the Kansas courts had "a continuing duty of determining even on [their] own initiative" whether they had subject-matter jurisdiction. *Id.*, 200 Kan. at 132, 434 P.2d at 1014. Petitioner's claims therefore could not have been waived by any failure to raise them in the trial court. *Id.; see also Flast v. Cohen,*

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[6]Because it is the Court of Appeals' decision that is before this Court, *see* n. 5 above, the fact that petitioner's Indian Child Welfare Act claim was not asserted in the Kansas Supreme Court does not bar this Court's review of that claim. In addition, had the Kansas Supreme Court granted review, the case would have been "heard on the . . . briefs previously filed in the Court of Appeals", K.S.A. 60-2701a, Kansas Rule of Appellate Practice 8.03(b), which contained the Indian Child Welfare Act claim. *See also* the discussion below at 5-6.

392 U.S. 83, 88 n.2 (1968); *United States v. Griffin*, 303 U.S. 226, 229 (1938). And, this Court has jurisdiction to review them.[7]

II. THIS COURT SHOULD REVIEW THE LOWER COURT DECISIONS

If allowed to stand, the actions of the Kansas courts would result in the termination of petitioner's parental rights and the denial, from the very outset, of any opportunity for petitioner to develop a relationship with his daughter. That outcome is intolerable and should be reviewed by this Court because it can only occur through the violation of a federal statute and the United States Constitution. Petitioner's claims raise important issues regarding the application and interpretation of the Indian Child Welfare Act and the constitutionality of K.S.A. 59-2105(c)(4).

A. The Standard Embodied in K.S.A. 59-2105(c)(4) and Relied Upon by the Kansas Courts Violates Due Process

Respondents argue that petitioner was accorded due process because he was notified of and allowed to participate in the adoption proceeding. That does not, however, address petitioner's due process claim. Petitioner challenges the standard used in the termination of his parental rights and adoption of his daughter.

The Kansas statute at issue, 59-2105(c)(4), allows adoption without the consent of an illegitimate father

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[7]This Court has jurisdiction to consider petitioner's Indian Child Welfare Act claims for a separate reason as well. Congress has specifically provided that the termination of parental rights in violation of the Act may be invalidated by any court of competent jurisdiction. 25 U.S.C. § 1914. Petitioner's claims under that Act therefore could not be waived. The Kansas courts had a continuing duty to determine the applicability of the Act and to implement its protective provisions. Cf. Pino v. Natural Mother, 700 P.2d 198 (N.M. Ct. App. 1985).

where he did not support the mother in the six months before the birth of their child. The effect of the statute is to permit adoption and termination of parental rights against the wishes of illegitimate fathers before they have even had the opportunity to form a relationship with their children. That is directly in conflict with the decisions of this Court recognizing that it is precisely that opportunity that the Due Process Clause protects in this situation. *Lehr v. Robertson,* 463 U.S. 248, 262 (1983); *Quilloin v. Walcott,* 434 U.S. 246, 254-255 (1978). Thus, the statutory standard can, as in this case, arbitrarily eliminate that opportunity even though the natural father has demonstrated his commitment by seeking custody directly after his child was born.

B. There is no Rational Basis for the Unequal Treatment Afforded Unwed Fathers in the Kansas Statute

The Kansas statute dispenses with the necessity of obtaining an unwed father's consent in certain situations. Kansas does not eliminate the right to consent of unwed mothers and legitimate parents in the same situations. Respondents argue that there is a rational basis for that disparate treatment because where the statute applies the mother has supported herself without assistance from the father.

In the first place, that argument provides no justification for the differing treatment of legitimate and illegitimate fathers. A legitimate father could fail to provide support in the last six months of his wife's pregnancy and yet retain the right to consent to his child's adoption. Secondly, as in the due process context, this Court has recog-

nized that "the existence or nonexistence of a substantial *relationship between parent and child* is a relevant criterion in evaluating both the rights of the parent and the best interests of the child." *Lehr,* 463 U.S. at 266-267 (emphasis added). K.S.A. 59-2105(c) (4), however, operates to divest illegitimate fathers of the right to consent because of actions that take place before the birth of the child. There is no opportunity for the unwed father to establish that he and the unwed mother are in fact "similarly situated *with regard to their relationship with the child*". *Lehr,* 463 U.S. at 267 (emphasis added). The result is especially harsh where, as here, the father has come forward at the outset and sought custody.

C. Application of the Kansas Statute to an Indian Parent Violates the Indian Child Welfare Act

It is clear and indisputable that the use of K.S.A. 59-2105(c) (4) to terminate the parental rights of petitioner, an enrolled member of an Indian tribe, violated the Indian Child Welfare Act (hereafter "Act"). Under the Act, those rights may be terminated in involuntary state proceedings only upon a determination "supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f).

Respondents do not contest the fact that there was a violation but argue that the state courts did not determine the applicability of the Act because there was no evidence

or contention that petitioner or his daughter were Indians.[8] In the Kansas Court of Appeals, however, petitioner informed the court that he had discovered that his daughter was eligible for membership in the Chickasaw Tribe. Petitioner's Brief to the Court of Appeals at 14. He requested that the court vacate the district court's adoption decree and remand for proceedings in light of the Act. *Id.* Respondents did not (and do not now) contest that petitioner or his child are Indian. Faced with the contention that the Act applied and the invocation of 25 U.S.C. §1914, the Court of Appeals had the authority and duty to invalidate the adoption decree and remand for proceedings in light of the Act or, at the very least, proceedings to determine the applicability of the Act.

Respondents also argue that if the Act were applied it would not require a different result because, in that instance, the mother would withdraw her consent to the adoption. That argument is a completely unwarranted minimization of the impact of the Act on these proceedings. First, and foremost, application of the Act would prevent the termination of petitioner's parental rights in the facile manner allowed by the Kansas statute. That in itself is sufficient reason to apply the Act. Application would, however, also guarantee that any future proceedings would be conducted in accordance with the Act and would thereby implement

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[8]In adoption proceedings, Kansas law authorizes social workers reporting on the advisability of adoptions to obtain genetic information about the children involved. K.S.A. 59-2278(c). Had that been done in this case, the trial court would have been aware of petitioner's and his daughter's Indian heritage.

the protective provisions that have been mandated by Congress.

Respectfully submitted,

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